



Billing Code: 4410-A5-P

DEPARTMENT OF JUSTICE

Office of the Attorney General

[Docket No. OAG 144; AG Order No. 3408-2013]

Pilot Project for Tribal Jurisdiction over Crimes of Domestic Violence

AGENCY: Office of the Attorney General, Justice.

ACTION: Final notice; solicitation of applications for pilot project.

SUMMARY: This final notice establishes procedures for Indian tribes to request designation as participating tribes under section 204 of the Indian Civil Rights Act of 1968, as amended, on an accelerated basis, under the voluntary pilot project described in the Violence Against Women Reauthorization Act; establishes procedures for the Attorney General to act on such requests; and solicits such requests from Indian tribes.

DATES: This final notice is effective [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES: Mr. Tracy Toulou, Director, Office of Tribal Justice, Department of Justice, 950 Pennsylvania Avenue, NW, Room 2310, Washington, DC 20530, e-mail OTJ@usdoj.gov.

FOR FURTHER INFORMATION CONTACT: Mr. Tracy Toulou, Director, Office of Tribal Justice, Department of Justice, at (202) 514-8812 (not a toll-free number) or OTJ@usdoj.gov.

SUPPLEMENTARY INFORMATION:

Section 908(b)(2) of the Violence Against Women Reauthorization Act of 2013 (VAWA 2013) establishes a voluntary pilot project for Indian tribes that wish to commence exercising jurisdiction on an accelerated basis over certain crimes of domestic violence and dating violence and certain criminal violations of protection orders in Indian country. This final notice

establishes procedures for tribes to request designation as a participating tribe under the Pilot Project. A tribe may make such a request at any time prior to March 7, 2015, by submitting a completed Application Questionnaire, along with any attachments, by e-mail (or, if necessary, by mail) to the Office of Tribal Justice, Department of Justice.

The Department of Justice will give the same priority consideration to any tribal request that it receives within 30 days after publication of this final notice in the *Federal Register*, regardless of the precise date within that initial 30-day period on which a tribe makes its request. Soon after that 30-day period has expired, the Department of Justice will begin reviewing each requesting tribe's Application Questionnaire, including attached excerpts of tribal laws, rules, and policies. After coordinating with the Department of the Interior and consulting with affected tribes, the Department of Justice will determine whether the requesting tribe's criminal justice system has adequate safeguards in place to protect defendants' rights under the Indian Civil Rights Act of 1968, as amended by VAWA 2013. If the Department concludes that adequate safeguards are in place, it may grant the tribe's request after consulting with the tribe to establish a date on which the tribe may commence exercising special domestic violence criminal jurisdiction. The Department of Justice will apply the same procedures to tribal requests made at any point later in the Pilot Project, up to March 7, 2015.

Discussion

1. Statutory Background

Overview

On March 7, 2013, President Obama signed into law the Violence Against Women Reauthorization Act of 2013 (VAWA 2013).¹ Title IX of VAWA 2013, entitled “Safety for Indian Women,” contains section 904 (Tribal Jurisdiction over Crimes of Domestic Violence) and section 908 (Effective Dates; Pilot Project), both of which were initially drafted and proposed to Congress by the Department of Justice in 2011.² The purposes of these sections are to decrease domestic violence in Indian country, to strengthen the capacity of Indian tribes to exercise their inherent sovereign power to administer justice and control crime, and to ensure that perpetrators of domestic violence are held accountable for their criminal behavior.³

Section 904 recognizes the inherent power of “participating tribes” to exercise “special domestic violence criminal jurisdiction” (SDVCJ) over certain defendants, regardless of their Indian or non-Indian status, who commit acts of domestic violence or dating violence or violate certain protection orders in Indian country. Section 904 also specifies the rights that a participating tribe must provide to defendants in SDVCJ cases.

Section 908(b)(1) provides that tribes generally cannot exercise SDVCJ until at least two years after the date of VAWA 2013’s enactment—that is, on or after March 7, 2015. However, section 908(b)(2) establishes a “Pilot Project” that authorizes the Attorney General, in the exercise of his discretion, to grant a tribe’s request to be designated as a “participating tribe” on an accelerated basis and to commence exercising SDVCJ on a date (prior to March 7, 2015) set by the Attorney General, after coordinating with the Secretary of the Interior, consulting with affected tribes, and concluding that the tribe’s criminal justice system has adequate safeguards in

¹ Public Law 113–4, 127 Stat. 54 (2013); *see* Remarks on Signing the Violence Against Women Reauthorization Act of 2013, 2013 Daily Comp. Pres. Docs. 139 (Mar. 7, 2013).

² *See* Letter from Ronald Weich, Assistant Attorney General, to the Hon. Joseph R. Biden, Jr., President, United States Senate, at 1-2 & attachments (July 21, 2011).

³ *See* S. Rep. No. 112-153, at 8-11, 32 (2012); *see also* S. 1763, 112th Cong., at 1-2 (as reported by the S. Comm. on Indian Affairs, Dec. 27, 2012) (long title listing bill’s purposes); H.R. 757, 113th Cong., at 1 (2013) (same).

place to protect defendants' rights under the Indian Civil Rights Act of 1968, as amended by VAWA 2013. This final notice establishes procedures for tribes to make such requests and for the Department of Justice to grant or deny them and also solicits applications from tribes that wish to commence exercising SDVCJ on an accelerated basis.

Domestic Violence in Indian Country

Congress found that Native American women suffer domestic violence and dating violence at epidemic rates, and often at the hands of non-Indian abusers.⁴ And Census data show that a large fraction of Indian-country residents are non-Indian and that tens of thousands of Native American married women have non-Indian husbands.⁵

Domestic violence and dating violence committed in Indian country by Indian abusers against their Indian spouses, intimate partners, and dating partners generally fall within the criminal jurisdiction of the tribe. But prior to the effective date of the tribal provisions in VAWA 2013, if the victim is Indian and the perpetrator is non-Indian, the tribe lacks criminal jurisdiction as a matter of federal law and the crime can be prosecuted only by the United States or, in some circumstances, by the state in which the tribe's Indian country is located. Even violent crimes committed by a non-Indian husband against his Indian wife, in the presence of their Indian children, in their home on the Indian reservation, cannot be prosecuted by the tribe.⁶

⁴ See S. Rep. No. 112-153, at 3, 7-11, 32 (2012) (citing studies); see also Tribal Law and Order Act of 2010, Public Law 111-211, tit. II, sec. 202(a)(5), 124 Stat. 2258, 2262.

⁵ See S. Rep. No. 112-153, at 9 (2012); U.S. Census Bureau, 2010 Census Briefs, *The American Indian and Alaska Native Population: 2010*, at 13-14 & tbl. 5 (2012) (showing that 1.1 million American Indians and 3.5 million non-Indians reside in American Indian areas); U.S. Census Bureau, Census 2010 Special Tabulation, Census 2010 PHC-T-19, Hispanic Origin and Race of Coupled Households: 2010, *Table 1, Hispanic Origin and Race of Wife and Husband in Married-Couple Households for the United States: 2010* (2012) (analyzing married-couple households nationwide, regardless of whether they reside within or outside Indian country, and showing that more than 54% of Indian wives have non-Indian husbands).

⁶ The tribal provisions of VAWA 2013 are gender-neutral; but in the interests of brevity, this final notice sometimes uses male pronouns or examples to describe perpetrators of domestic violence or dating violence and female pronouns or examples to describe their victims.

This jurisdictional scheme has proved ineffective in ensuring public safety. Too often, crimes go unprosecuted and unpunished, and the violence escalates.

The History of the Jurisdictional Gap

This jurisdictional gap has not always existed. In the early days of the Republic, tribes routinely, and with the United States' assent, punished non-Indians who committed acts of violence on tribal lands. For example, the very first Indian treaty ratified by the United States Senate under the Federal Constitution—the 1789 Treaty with the Wyandot, Delaware, Ottawa, Chippewa, Potawatomi, and Sac Nations—recognized that, “[i]f any person or persons, citizens or subjects of the United States, or any other person not being an Indian, shall presume to settle upon the lands confirmed to the said [Indian tribal] nations, he and they shall be out of the protection of the United States; and the said nations may punish him or them in such manner as they see fit.”⁷ Similar language appeared in the last Indian treaty ratified before the Constitutional Convention—the 1786 Treaty with the Shawnee Nation.⁸

As recently as the 1970s, dozens of Indian tribes exercised criminal jurisdiction over non-Indians. But in 1978, in *Oliphant v. Suquamish Indian Tribe*,⁹ the Supreme Court created federal common law preempting the exercise of the tribes' inherent sovereign power to prosecute non-Indians.¹⁰ The *Oliphant* Court noted, however, that Congress has the constitutional authority to override the Court's holding and restore tribes' power to exercise criminal jurisdiction over non-Indians.¹¹ Justice Rehnquist, writing for the majority in *Oliphant*, expressly stated that the increasing sophistication of tribal court systems, the protection of defendants' procedural rights

⁷ Treaty with the Wyandot, Delaware, Ottawa, Chippewa, Potawatomi, and Sac Nations, art. IX, Jan. 9, 1789, 7 Stat. 28, 30.

⁸ See Treaty with the Shawnee Nation, art. VII, Jan. 31, 1786, 7 Stat. 26, 27.

⁹ 435 U.S. 191 (1978).

¹⁰ See *id.* at 195-212.

¹¹ See *id.* at 195 & n.6, 206, 210-12.

under the Indian Civil Rights Act of 1968,¹² and the prevalence of non-Indian crime in Indian country were all “considerations for Congress to weigh” in deciding whether to authorize tribes to try non-Indians.¹³

Congress’s New Law Recognizing Special Domestic Violence Criminal Jurisdiction

In enacting VAWA 2013, Congress expressly recognized tribes’ inherent power to resume exercising criminal jurisdiction over non-Indians. That recognition extends, however, only to crimes of domestic violence or dating violence and criminal violations of certain protection orders that occur in Indian country, in cases in which certain conditions are met. Specifically, the cases must have Indian victims; the defendants must reside in the Indian country of, or have other specified significant ties to, the prosecuting tribe; and the tribe’s criminal justice system must have adequate safeguards in place to fully protect defendants’ rights. Recognizing that many tribes may need time to implement those safeguards, Congress set an effective date two years after the enactment of VAWA 2013 (i.e., March 7, 2015), while giving tribes that are ready sooner the opportunity to participate in a Pilot Project at the Attorney General’s discretion.

Section 904 of VAWA 2013 adds a new section 204 to the Indian Civil Rights Act of 1968 (ICRA).¹⁴ Prior to VAWA 2013’s enactment, ICRA was codified at 25 U.S.C. 1301-1303. Section 204 of ICRA is codified at 25 U.S.C. 1304, so this final notice cites that United States Code section when referring to the new law.

¹² Public Law 90–284, tit. II, 82 Stat. 77 (1968).

¹³ *Oliphant*, 435 U.S. at 212; *see also United States v. Lara*, 541 U.S. 193, 206 (2004) (holding that the Constitution allows Congress to override “‘judicially made Indian law’” (quoting *Oliphant*, 435 U.S. at 206) (emphasis added in *Lara*)).

¹⁴ Public Law 90–284, tit. II, 82 Stat. 77 (1968).

The Pilot Project established by VAWA 2013’s section 908(b)(2) focuses specifically on the power of a “participating tribe” to exercise SDVCJ under subsections (b), (c), and (d) of 25 U.S.C. 1304. A “participating tribe” is simply an Indian tribe (as defined in 25 U.S.C. 1301(1)) that elects to exercise SDVCJ over the tribe’s Indian country (as defined in 18 U.S.C. 1151).¹⁵

Becoming a “participating tribe” and exercising SDVCJ—whether as part of the Pilot Project between now and March 2015, or at any time after March 2015—are entirely voluntary. There is no requirement that any particular tribe or any specific number of tribes choose to become participating tribes and exercise SDVCJ. VAWA 2013 does not impose an unfunded mandate upon any tribe or diminish the criminal jurisdiction of the United States or of any state. Tribes that do not choose to participate in the Pilot Project may nonetheless become participating tribes later, so long as they satisfy the statutory requirements.

“Special domestic violence criminal jurisdiction” is defined in section 1304(a)(6) to mean “the criminal jurisdiction that a participating tribe may exercise under this section but could not otherwise exercise.” Nearly all tribes that possess governmental powers over an area of Indian country can already exercise criminal jurisdiction over any Indian in that area (whether the defendant is a member of the prosecuting tribe or a “nonmember Indian”). For these tribes, therefore, SDVCJ effectively is confined to criminal jurisdiction over non-Indians. Here, the term “non-Indian” means any person who is not an Indian as defined in 25 U.S.C. 1301(4) and

¹⁵ 25 U.S.C. 1304(a)(4). The term “Indian country” means “(a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.” 18 U.S.C. 1151; *see also* 25 U.S.C. 1304(a)(3).

thus could not be subject to federal criminal jurisdiction under the Major Crimes Act, 18 U.S.C. 1153.¹⁶

The Nature of Special Domestic Violence Criminal Jurisdiction

Subsection (b) of section 1304 describes the nature of SDVCJ. Paragraph (1) of that subsection states that a participating tribe's governmental powers include "the inherent power of that tribe, which is hereby recognized and affirmed, to exercise [SDVCJ] over all persons." Congress patterned that language after the 1991 federal statute that expressly recognized and affirmed tribes' inherent power to exercise criminal jurisdiction over all Indians, implicitly including nonmember Indians.¹⁷ The Supreme Court upheld the 1991 statute as a constitutional exercise of Congress's authority in *United States v. Lara*.¹⁸

Paragraphs (2) and (3) of subsection 1304(b) clarify that a participating tribe may exercise SDVCJ only concurrently, as the new law does not alter federal (or state) criminal jurisdiction. Importantly, the prohibition against double jeopardy does not prevent a defendant from being tried for the same conduct by more than one sovereign government. So, for example, a defendant who has been acquitted or convicted in a federal criminal proceeding can be tried for the same conduct in a subsequent tribal criminal proceeding. As always when a case falls under concurrent criminal jurisdiction, coordination between jurisdictions will help ensure that

¹⁶ Due to a Senate amendment, VAWA 2013's section 910(a) provides that the amendments made by section 904 (codified at 25 U.S.C. 1304) apply in Alaska only to the Indian country of the Metlakatla Indian Community, Annette Island Reserve. In addition, the Supreme Court held in *Alaska v. Native Village of Venetie Tribal Government*, 522 U.S. 520, 526-34 (1998), that lands conveyed by the Alaska Native Claims Settlement Act of 1971, Public Law 92-203, 85 Stat. 688 (codified, as amended, at 43 U.S.C. 1601-1629h), do not constitute "Indian country." Therefore, section 1304 will have no effect on the criminal jurisdiction of most Indian tribes in Alaska.

¹⁷ Public Law 102-137, sec. 1, 105 Stat. 646 (1991) (permanent legislation) (codified at 25 U.S.C. 1301(2)); see Public Law 101-511, tit. VIII, sec. 8077(b), 104 Stat. 1892 (1990) (temporary legislation) (same). ICRA defines the "powers of self-government" to include "the inherent power of Indian tribes, hereby recognized and affirmed, to exercise criminal jurisdiction over all Indians." 25 U.S.C. 1301(2).

¹⁸ 541 U.S. 193 (2004).

investigative and prosecutorial resources are deployed efficiently and that the same defendant is not expected to appear at two different trials simultaneously.

Paragraph (4) sets forth two important exceptions to participating tribes' exercise of SDVCJ. First, subparagraph (A) provides that there is no SDVCJ over an alleged offense if neither the defendant nor the alleged victim is an Indian. Cases involving only non-Indians typically fall within a state's exclusive criminal jurisdiction. SDVCJ will be exercised in cases with Indian victims and non-Indian defendants. Second, subparagraph (B) limits SDVCJ to cases in which the defendant has significant ties to the participating tribe that is seeking to prosecute him. Specifically, the defendant must (1) reside in the tribe's Indian country; (2) be employed in the tribe's Indian country; or (3) be a spouse, intimate partner, or dating partner either of an Indian who resides in the tribe's Indian country or of a member of the tribe. Both of these two exceptions, as described in subparagraphs (A) and (B), are jurisdictional, so the prosecution will bear the burden of proving these jurisdictional facts.

The Criminal Conduct Subject to Special Domestic Violence Criminal Jurisdiction

Subsection (c) of 25 U.S.C. 1304, the second of the three key subsections for present purposes, describes the criminal conduct potentially encompassed by a participating tribe's SDVCJ. The only types of criminal conduct that are subject to a tribe's exercise of SDVCJ are (1) acts of domestic violence or dating violence that occur in the tribe's Indian country, and (2) violations of certain protection orders that occur in the tribe's Indian country.¹⁹ The terms

¹⁹ Section 1304(c)(2) provides that a participating tribe may exercise SDVCJ over a defendant for "[a]n act that— (A) occurs in the Indian country of the participating tribe; and (B) violates the portion of a protection order that . . . prohibits or provides protection against violent or threatening acts or harassment against, sexual violence against, contact or communication with, or physical proximity to, another person; . . . was issued against the defendant; . . . is enforceable by the participating tribe; and . . . is consistent with [18 U.S.C. 2265(b)]." 25 U.S.C. 1304(c)(2). Section 1304(a)(5) defines a "protection order" to mean "any injunction, restraining order, or other order issued by a civil or criminal court for the purpose of preventing violent or threatening acts or harassment against, sexual violence against, contact or communication with, or physical proximity to, another person," including "any

“domestic violence” and “dating violence” are defined in 25 U.S.C. 1304(a)(2) and (1), respectively.²⁰

Criminal conduct that occurs outside of Indian country is not covered. In addition, unless a violation of a protection order is involved, crimes of child abuse or elder abuse and crimes between two strangers (including sexual assaults) generally are not covered.

Subsection (c) limits the categories of criminal conduct that are subject to SDVCJ. It does not define any criminal offense. The criminal offenses and their elements are a matter of tribal, not federal, law.

The Rights of Criminal Defendants in SDVCJ Cases

temporary or final order issued by a civil or criminal court, whether obtained by filing an independent action or as a pendent[e] lite order in another proceeding, if the civil or criminal order was issued in response to a complaint, petition, or motion filed by or on behalf of a person seeking protection.” *Id.* 1304(a)(5).

A protection order issued by a state, tribal, or territorial court is consistent with 18 U.S.C. 2265(b) if “such court has jurisdiction over the parties and matter under the law of such State, Indian tribe, or territory; and . . . reasonable notice and opportunity to be heard is given to the person against whom the order is sought sufficient to protect that person’s right to due process. In the case of ex parte orders, notice and opportunity to be heard must be provided within the time required by State, tribal, or territorial law, and in any event within a reasonable time after the order is issued, sufficient to protect the respondent’s due process rights.” 18 U.S.C. 2265(b). As amended by VAWA 2013’s section 905, 18 U.S.C. 2265(e) now provides that a tribal court “shall have full civil jurisdiction to issue and enforce protection orders involving any person, including the authority to enforce any orders through civil contempt proceedings, to exclude violators from Indian land, and to use other appropriate mechanisms, in matters arising anywhere in the Indian country of the Indian tribe (as defined in [18 U.S.C.] 1151) or otherwise within the authority of the Indian tribe.” *Id.* 2265(e).

²⁰ Section 1304(a)(2) defines the term “domestic violence” as “violence committed by a current or former spouse or intimate partner of the victim, by a person with whom the victim shares a child in common, by a person who is cohabitating with or has cohabitated with the victim as a spouse or intimate partner, or by a person similarly situated to a spouse of the victim under the domestic- or family-violence laws of an Indian tribe that has jurisdiction over the Indian country where the violence occurs.” 25 U.S.C. 1304(a)(2). Under section 1304(a)(7), which in turn incorporates 18 U.S.C. 2266(7), the term “spouse or intimate partner” includes “a spouse or former spouse of the abuser, a person who shares a child in common with the abuser, and a person who cohabits or has cohabited as a spouse with the abuser; or . . . a person who is or has been in a social relationship of a romantic or intimate nature with the abuser, as determined by the length of the relationship, the type of relationship, and the frequency of interaction between the persons involved in the relationship; and . . . any other person similarly situated to a spouse who is protected by the domestic or family violence laws of the State or tribal jurisdiction in which the injury occurred or where the victim resides.” 18 U.S.C. 2266(7); *see* 25 U.S.C. 1304(a)(7). Section 1304(a)(1) defines the term “dating violence” as “violence committed by a person who is or has been in a social relationship of a romantic or intimate nature with the victim, as determined by the length of the relationship, the type of relationship, and the frequency of interaction between the persons involved in the relationship.” 25 U.S.C. 1304(a)(1).

Subsection (d) of 25 U.S.C. 1304, the third key subsection for present purposes, describes the federal statutory rights that participating tribes must provide to defendants when exercising SDVCJ. Although the United States Constitution, which constrains the federal and state governments, has never applied to Indian tribes (which were not invited to, and did not attend, the 1787 Constitutional Convention), that fact does not leave the rights of individual defendants in tribal courts unprotected. Both tribal law and federal statutory law provide important protections for criminal defendants' rights. The tribal courts' application of the federal statutory rights described in subsection 1304(d) should be comparable to state courts' application of the corresponding federal constitutional rights in similar cases.

Subsection (d)(1)-(4) lists four sets of federal rights. The first set of defendants' rights, in paragraph (1), incorporates all rights under ICRA, 25 U.S.C. 1301-1304, that apply to a defendant in a criminal proceeding. This list of rights is substantively very similar (but not identical) to the set of criminal defendants' rights that are protected by the United States Constitution's Bill of Rights and have been incorporated into the Fourteenth Amendment's Due Process Clause and thus made fully applicable to the states. For example, ICRA prohibits tribes from compelling any person in any criminal case to be a witness against himself (akin to the United States Constitution's Fifth Amendment)²¹ and from denying to any person in a criminal proceeding the right to a speedy and public trial (akin to the Sixth Amendment).²² ICRA also prohibits a tribe from denying to any person within its jurisdiction the equal protection of its laws or depriving any person of liberty or property without due process of law.²³ Because federal law

²¹ 25 U.S.C. 1302(a)(4).

²² *Id.* 1302(a)(6).

²³ *Id.* 1302(a)(8).

has required all tribes to protect these rights since Congress enacted ICRA in 1968, this list of rights should be familiar to tribal officials.

Furthermore, as amended by VAWA 2013, ICRA now requires a tribe that has ordered the detention of any person to timely notify him of his rights and privileges to petition a federal district court for a writ of habeas corpus and to petition the federal court to stay further detention and release him from custody pending review of the habeas petition.²⁴

Paragraph (2) of 25 U.S.C. 1304(d) requires a participating tribe exercising SDVCJ to provide defendants “all rights described in [25 U.S.C. 1302(c)]” in any criminal proceeding in which “a term of imprisonment of any length may be imposed.” Section 1302(c) describes five rights, as set forth in amendments to ICRA that Congress enacted as part of the Tribal Law and Order Act of 2010 (TLOA):²⁵ (1) the right to effective assistance of counsel at least equal to that guaranteed by the United States Constitution; (2) the right of an indigent defendant to the assistance of a licensed defense attorney, at the expense of the tribal government; (3) the right to a criminal proceeding presided over by a judge who is licensed to practice law and has sufficient legal training; (4) the right to have access, prior to being charged, to the tribe’s criminal laws, rules of evidence, and rules of criminal procedure; and (5) the right to a record of the criminal proceeding, including an audio or other recording of the trial proceeding.

Under TLOA’s amendments to ICRA, codified in section 1302(c), these five rights must be provided to a defendant in any criminal proceeding in which the tribe imposes on the defendant a total term of imprisonment of more than one year. Therefore, these five rights are

²⁴ *Id.* 1304(e). ICRA provides that “[t]he privilege of the writ of habeas corpus shall be available to any person, in a court of the United States, to test the legality of his detention by order of an Indian tribe.” *Id.* 1303. A federal court shall grant a stay of further detention if the court “finds that there is a substantial likelihood that the habeas corpus petition will be granted” and, “after giving each alleged victim in the matter an opportunity to be heard, finds by clear and convincing evidence that under conditions imposed by the court, the petitioner is not likely to flee or pose a danger to any person or the community if released.” *Id.* 1304(e)(2).

²⁵ Public Law 111–211, tit. II, sec. 234(a)(3), 124 Stat. 2258, 2280.

sometimes known as the “TLOA felony sentencing” requirements. In 25 U.S.C. 1304(d)(2), however, these same five rights must be provided to a defendant in any SDVCJ criminal proceeding in which the tribe imposes, or may impose, a term of imprisonment of any length. So indigent defense counsel, for example, is required in any SDVCJ misdemeanor case in which a term of imprisonment may be imposed.

Paragraph (3) of 25 U.S.C. 1304(d) guarantees the right to a trial by an impartial jury that is drawn from sources that reflect a fair cross section of the community and do not systematically exclude any distinctive group in the community, including non-Indians. This right to trial by an impartial jury is available to any defendant in any SDVCJ case, regardless of whether the defendant expressly requests a jury trial, and regardless of whether the offense that the tribe accuses him of is punishable by imprisonment. To properly safeguard this right, tribes exercising SDVCJ will have to determine who qualifies as part of the relevant “community” and how lists of those persons may be obtained and regularly updated. The law does not require that every jury in every SDVCJ case reflect a fair cross section of the community. Rather, the jury pool, or venire, from which the jury is drawn must be representative of the community. Some communities in Indian country contain sizeable non-Indian populations. Other communities in Indian country have few, if any, non-Indian members, and therefore inevitably will have few, if any, non-Indians in their jury pools. Under existing tribal laws, some tribes’ jury pools already include non-Indians, while others do not.

Paragraph (4) of 25 U.S.C. 1304(d) is a “constitutional catch-all” provision. Although it is likely of little or no direct relevance to the Pilot Project, it has the potential to cause confusion and therefore merits further discussion here. The three prior paragraphs of 25 U.S.C. 1304(d) encompass all the rights that the 113th Congress concluded must be protected in order for

Congress, acting within the constraints that the United States Constitution imposes on its authority, to recognize and affirm the participating tribes' inherent power to exercise SDVCJ over non-Indian defendants. The 113th Congress recognized, however, that the understanding of which rights are fundamental to our justice system can evolve over time. Therefore, Congress included paragraph (4), which requires a participating tribe to provide defendants in SDVCJ proceedings "all other rights whose protection is necessary under the Constitution of the United States in order for Congress to recognize and affirm the inherent power of the participating tribe to exercise [SDVCJ] over the defendant."

This provision does not require tribal courts to protect all federal constitutional rights that federal courts are required to protect (for example, the Fifth Amendment's grand-jury indictment requirement, which state courts are also not required to protect). Rather, paragraph (4) gives courts the flexibility to expand the list of protected rights to include a right whose protection the 113th Congress did not foresee as essential to the exercise of SDVCJ. In the two-year period of the Pilot Project, however, it seems unlikely that courts will hold that any such unforeseen right falls within the scope of paragraph (4).

Section 908, Effective Dates, and the Pilot Project

VAWA 2013's section 908 sets the effective dates for the three key subsections of 25 U.S.C. 1304—subsections (b), (c), and (d)—as well as establishing the Pilot Project. Section 908(b)(1) provides that these three subsections generally shall take effect on the date that is two years after the date of VAWA 2013's enactment, or March 7, 2015. So tribes generally cannot exercise SDVCJ until at least March 7, 2015. On or after March 7, 2015, any tribe that determines it meets the statutory requirements for exercising SDVCJ may do so. Approval from the Department of Justice will not be necessary.

An exception to the 2015 starting date, however, is set forth in section 908(b)(2), which establishes a Pilot Project that authorizes the Attorney General, in the exercise of his discretion, to grant a tribe's request to be designated as a participating tribe on an accelerated basis and commence exercising SDVCJ earlier. Section 908(b)(2) states in full:

(2) PILOT PROJECT.—

(A) IN GENERAL.—At any time during the 2-year period beginning on the date of enactment of this Act [March 7, 2013], an Indian tribe may ask the Attorney General to designate the tribe as a participating tribe under section 204(a) of Public Law 90–284 [codified at 25 U.S.C. 1304(a)] on an accelerated basis.

(B) PROCEDURE.—The Attorney General may grant a request under subparagraph (A) after coordinating with the Secretary of the Interior, consulting with affected Indian tribes, and concluding that the criminal justice system of the requesting tribe has adequate safeguards in place to protect defendants' rights, consistent with section 204 of Public Law 90–284 [codified at 25 U.S.C. 1304].

(C) EFFECTIVE DATES FOR PILOT PROJECTS.—An Indian tribe designated as a participating tribe under this paragraph may commence exercising special domestic violence criminal jurisdiction pursuant to subsections (b) through (d) of section 204 of Public Law 90–284 [codified at 25 U.S.C. 1304(b)–(d)] on a date established by the Attorney General, after consultation with that Indian tribe, but in no event later than the date that is 2 years after the date of enactment of this Act [March 7, 2015].

Only a tribe that wishes to begin exercising SDVCJ before March 7, 2015, needs to request approval from the Attorney General.

2. The Pilot Project

Given that the Pilot Project will directly and substantially affect Indian tribes in the next two years, the Department of Justice engaged in expedited but extensive consultation with tribal officials in the spring of 2013 on how best to design the Pilot Project. The procedures established here reflect valuable input received from tribal officials during consultation, as well as public comments received in the summer of 2013.

The Pilot Project's Structure and Two Phases

Congress provided a structure for the VAWA Pilot Project that is atypical. A conventional pilot or demonstration program lasts for several years and culminates with a report evaluating the program's success or failure and recommending that the program either be made nationwide and permanent or be discontinued. By contrast, here Congress has already determined that the key feature of the Pilot Project—tribes' exercise of SDVCJ—will become available nationwide just two years after VAWA 2013's enactment. So the question raised by this Pilot Project is not whether to expand the exercise of SDVCJ, but rather how best to exercise SDVCJ. Thus, tribal leaders emphasized during consultation that one of the Pilot Project's most important functions will be to support tribes in their efforts to collaboratively develop "best practices" that other (non-Pilot Project) tribes can use to implement SDVCJ in 2015 and beyond.

Tribal officials and employees repeatedly highlighted the usefulness of exchanging ideas with their counterparts in other tribes, peer to peer. They recognized that the Department of Justice, in coordination with the Department of the Interior, could play a key role in facilitating an intertribal collaboration and exchange of ideas. Tribal officials pointed to the example of the Tribal Self-Governance Demonstration Project, which began in the late 1980s with fewer than a dozen tribes but has now expanded to include hundreds of tribes that are actively managing their own programs.²⁶

Consistent with the views expressed by tribal leaders during consultation, the VAWA Pilot Project process has two phases: a planning and self-assessment phase that commenced with the publication of a notice in the *Federal Register* on June 14, 2013, and an implementation phase that commences with the publication of this final notice. In Phase One, in the summer and

²⁶ See Public Law 100-472, sec. 209, 102 Stat. 2285, 2296-98 (1988).

fall of 2013, tribes that preliminarily expressed interest in the Pilot Project engaged in ongoing consultations with the Departments of Justice and the Interior to address questions and concerns. These tribes were strongly encouraged to join the Intertribal Technical-Assistance Working Group on Special Domestic Violence Criminal Jurisdiction (ITWG) to exchange views, information, and advice about how tribes can best exercise SDVCJ, combat domestic violence, recognize victims' rights and safety needs, and fully protect defendants' rights.

To assist the ITWG and its members, the Department of Justice appended to its June 2013 *Federal Register* notice a preliminary list of substantive questions that helped identify key issues and develop a checklist of best practices for exercising SDVCJ. Some of the questions focused on statutory requirements. Others touched on broader issues that are potentially relevant to tribal best practices but clearly are not required by VAWA 2013 or any other federal law.

Starting with this preliminary list of questions, the ITWG's peer-to-peer technical assistance has covered a broad set of issues, from drafting stronger domestic violence codes and victim-centered protocols and policies, to improving public defender systems, to analyzing detention and correctional options for non-Indians, to designing more broadly representative jury pools. The objective has been to develop not a single, one-size-fits-all "best practice" for each of these issues, but rather multiple "best practices" that can be tailored to each tribe's particular needs, preferences, and traditions.

Tribes participating in the ITWG also have had opportunities to engage with the Departments of Justice and the Interior, which have provided technical advice to the working group as a whole and worked with individual tribes to address specific issues or concerns as needed. The two Departments have coordinated with each other and have supported the ITWG with targeted training and technical assistance to the extent possible with available resources.

Phase Two of the Pilot Project process, the implementation phase, will commence now, with the publication of this final notice, which specifies how tribes can certify that they meet the statutory requirements to exercise SDVCJ on an accelerated basis. During this phase, tribes may request designation as a participating tribe under 25 U.S.C. 1304 on an accelerated basis, and the Department will timely evaluate the requests based on the statutory criteria, after the required consultation with affected tribes and coordination with the Department of the Interior. The tribes whose requests are granted may commence prosecuting non-Indian perpetrators of domestic violence on a date established by the Department of Justice after further consultation with the tribe. The Department anticipates that some tribes may commence prosecuting SDVCJ cases in early 2014.

During consultation, tribal officials uniformly encouraged the Department to develop a mechanism for tribes to “self-certify” that they meet the statutory requirements to exercise SDVCJ. As a result, each requesting tribe will be expected to fill out an Application Questionnaire that asks the tribe to identify provisions of the tribe’s criminal code, rules of procedure, and written policies, as well as actual practices, that qualify the tribe to exercise SDVCJ on an accelerated basis. Each requesting tribe is asked to attach the relevant portions of its laws, rules, and policies to the completed Application Questionnaire. The materials collected from the tribes that successfully apply to participate in Phase Two of the Pilot Project eventually will be made publicly available on the Department of Justice’s website. The posted materials will serve as a resource for those tribes that may elect to commence exercising SDVCJ in March 2015 or later, after the Pilot Project has concluded.

This two-phased Pilot Project will benefit three sets of tribes, each in distinct ways. First, the tribes that successfully apply in the Pilot Project’s second phase will have the opportunity to

commence exercising SDVCJ, and thus enhance public safety in their communities, sooner than would otherwise be possible. And these tribes will establish an early, strong track record for effectively and fairly prosecuting all offenders who perpetrate crimes of domestic violence in Indian country, regardless of their Indian or non-Indian status. Second, the other tribes that, in the Pilot Project's first phase, preliminarily expressed interest in the Pilot Project and joined the ITWG will continue to have the opportunity to shape best practices that will strengthen criminal justice systems on many reservations, including their own, and thus will be better prepared to exercise SDVCJ after March 2015. And third, the tribes that do not participate in either phase of the Pilot Project will have the opportunity to learn from the experiences of the first two sets of tribes and to benefit from the body of tribal laws, rules, and policies that those tribes will have developed and implemented.

Phase One: Ongoing Consultation, Preliminary Expressions of Interest, and the Intertribal Technical-Assistance Working Group

In the weeks following the Department's June 2013 *Federal Register* notice, 39 tribes submitted preliminary expressions of interest in the Pilot Project. A tribe that submitted a preliminary expression of interest during Phase One is not obligated during Phase Two to submit a request for designation as a participating tribe if the tribe decides to wait at least until March 7, 2015, to commence exercising SDVCJ. Conversely, a tribe that wishes during Phase Two to submit a request for designation as a participating tribe (so that it can commence exercising SDVCJ before March 7, 2015) need not have submitted a preliminary expression of interest during Phase One. However, submitting a preliminary expression of interest as early as possible facilitated the Justice Department's efforts to provide timely information to the tribe, to address issues of unique concern to the tribe, and to identify, in coordination with tribal officials, those areas where the tribe might benefit from technical assistance.

Each of the 39 tribes authorized at least one person to represent the tribe on the ITWG. The tribes' representatives on the ITWG included tribal leaders, tribal judges, tribal attorneys, prosecutors, victim advocates, victim service providers, police officers, and court administrators.

The Department of Justice asked particular Justice and Interior Department employees and non-federal experts (including persons affiliated with national intertribal organizations) to participate in ITWG meetings as observers or subject-matter experts who could provide technical assistance. But the tribal representatives were always free to meet without any federal employees present. And tribal members of the ITWG could informally exchange written drafts of tribal criminal code provisions, tribal rules of procedure, tribal policies, and other tribal best practices, with or without sharing these drafts with the federal employees. The lead organizations providing technical assistance to the ITWG have been the National Congress of American Indians (NCAI), the Tribal Law and Policy Institute (TLPI), and the National Council of Juvenile and Family Court Judges (NCJFCJ).

The full ITWG has held two in-person meetings, in South Carolina on August 20 and 21, 2013, and in North Dakota on October 29 and 30, 2013. And the ITWG or its subcommittees have met by conference call seven times, on July 19, August 5, September 10, September 20, October 4, October 8, and October 10, 2013. A Tribal Code Development Subcommittee has developed a checklist that tribes can use as a tool to assess their compliance with federal requirements and readiness to exercise SDVCJ. The ITWG has also conducted Webinars and special sessions focusing on particular issues such as jury selection and indigent defense. On September 13, 2013, the Center for Jury Studies, a project of the National Center for State Courts, presented a Webinar on the fair cross section requirement, and a second Webinar on jury selection has been scheduled. The ITWG's Public Defender Advisory Group (PDAG) conducted

its first of four planned Webinars, on competency of defenders and the timing of their appointment, on September 27, 2013. PDAG's upcoming Webinars will cover models for quality assurance and training of conflict attorneys; standards for defining indigency; and investigation services and caseload and workload standards. A series of Webinars on victims' rights will commence this fall.

Regional offshoots of the ITWG have also sprouted. For example, on September 5, 2013, ITWG members and other tribes from Oklahoma gathered in Okmulgee to discuss VAWA implementation in the unique context of Oklahoma. And NCAI sponsored breakout sessions for ITWG members and other tribes interested in VAWA implementation at their Mid-Year Conference in Reno, Nevada, on June 24, 2013, and at their 70th Annual Convention in Tulsa, Oklahoma, on October 15, 2013.

ITWG meetings will proceed into Phase Two, to continue identifying, documenting, and disseminating best practices that can be replicated by other tribes, and to help collect data and assess the Pilot Project tribes' efforts to exercise SDVCJ, combat domestic violence, recognize victims' rights and safety needs, and fully protect defendants' rights. Alongside this intertribal work, the Department of Justice recognizes the importance of the government-to-government relationship that exists between the United States and each individual tribe. During Phase One, some tribes engaged in one-on-one discussions with the Department of Justice or the Department of the Interior about training, technical assistance, and issues unique to that tribal government. Both Departments look forward to further one-on-one consultations during Phase Two.

Phase Two: Tribal Requests and the Application Questionnaire

With Phase Two of the Pilot Project now beginning, tribes may request designation as participating tribes that may commence exercising SDVCJ on an accelerated basis. It is

important to note that the statute does not set the number of tribes that can participate in the Pilot Project and exercise SDVCJ on an accelerated basis, though it does limit the Pilot Project to just two years, effectively ending in March 2015. After that time, any tribe that determines it meets the statutory requirements and wishes to exercise SDVCJ may do so without the involvement of the Department of Justice.

During the course of the Pilot Project, however, section 908(b)(2)(B) of the statute authorizes the Department of Justice to grant a request only after concluding that the requesting tribe's criminal justice system "has adequate safeguards in place to protect defendants' rights, consistent with [25 U.S.C. 1304]." Tellingly, Congress did not restrict the Department's purview to the rights of defendants specified in subsection 1304(d), but rather demanded consistency with all subsections of section 1304. The statute thus requires the Department to consider how the tribe plans to comply with the entirety of section 1304, focusing (though not exclusively) on the specific defendants' rights enumerated in subsection 1304(d).

The Attorney General is required to exercise his discretion in the Pilot Project process, as the statute states that he "may" (not "shall") grant a qualifying tribe's request. In exercising his discretion, the Attorney General will be bound by the text of section 1304 and guided by the section's broader purposes: to decrease domestic violence in Indian country, to strengthen the capacity of Indian tribes to exercise their inherent sovereign power to administer justice and control crime, and to ensure that perpetrators of domestic violence are held accountable for their criminal behavior.

To address the overwhelming preference for a self-certification process that tribal leaders and experts expressed during consultation and in public comments, and to facilitate moving quickly during the Pilot Project's two-year window while fulfilling the Attorney General's

statutory duty, the Department will ask each requesting tribe to provide certified answers to a list of detailed questions about the various safeguards that the tribe has put in place to protect defendants' rights. The Application Questionnaire, appended to this final notice, is informed by comments that the public submitted in response to the June 2013 *Federal Register* notice and by lessons learned through the ITWG process.

The Application Questionnaire will need to be completed and certified as accurate by the tribe's chief executive, judicial, and legal officers. To provide an adequate basis for the Justice Department to make the determination demanded by the statute, the questions are comprehensive and detailed. The bulk of the questions likely can be answered with a single sentence or a simple "yes" or "no," supplemented with applicable excerpts from the tribe's laws, rules, or policies. This way, the Questionnaire attempts to put as little burden as possible on tribal officials and employees, while addressing the Department's need for sufficiently detailed information to perform its statutory responsibility. The Application Questionnaire also may help a tribe assess its own criminal justice system's readiness to exercise SDVCJ.

The completed, certified Application Questionnaire will serve as the tribe's formal request to be designated as a participating tribe that can exercise SDVCJ on an accelerated basis under the Pilot Project. The Department will give the same priority consideration to any tribal request that it receives within 30 days after publication of this final notice in the *Federal Register*, regardless of the precise date within that initial 30-day period on which a tribe makes its request. The Department also will consider any tribal request received before March 7, 2015. And the Department will consider Phase Two requests from both ITWG members and nonmembers.

Phase Two: The Federal Response to Tribal Requests

Once the Department of Justice has received a requesting tribe's complete, certified Application Questionnaire, including attached excerpts of tribal laws, rules, and policies, the Department will take the following eight steps.

First, the requesting tribe's entire application will be shared with relevant components of the Department of Justice, including any U.S. Attorney's Office with jurisdiction over the tribe's Indian country, and relevant components of the Department of the Interior, including the Office of the Assistant Secretary of the Interior-Indian Affairs; the Office of the Solicitor of the Interior; and the Bureau of Indian Affairs' Office of Justice Services (BIA-OJS).

Second, the Justice Department will post a notice on its Tribal Justice and Safety website (<http://www.justice.gov/tribal/>) indicating that the tribe has submitted a request in Phase Two of the Pilot Project. This notice will announce an expedited telephonic consultation for officials of federally recognized Indian tribes who wish to comment on the request, as well as an expedited deadline and instructions for submitting written comments. As required by VAWA 2013's section 908(b)(2)(B), the Justice Department will consult with elected and duly appointed officials of affected tribes, on an expedited basis, consistent with applicable Executive Orders, Presidential Memoranda, and Department policy statements on tribal consultation.

Third, generally working through the requesting tribe's authorized point of contact (POC), as identified in the tribe's Application Questionnaire, the Justice Department may make follow-up inquiries about the tribe's criminal justice system.

Fourth, personnel from the Departments of Justice and the Interior will coordinate in reviewing the requesting tribe's application. They also may consider relevant information obtained in other contexts, including grant applications, such as the tribe's prior Coordinated

Tribal Assistance Solicitation (CTAS) applications, and any tribal-court review that BIA-OJS has conducted under 25 U.S.C. 3612.

Fifth, if needed and if funding is available, the Department may provide appropriate training or technical assistance to a tribe. The Department may also offer specific training and technical assistance to address particular needs through the National Indian Country Training Initiative or through the Department's grant-making components (the Office of Justice Programs (OJP), the Office on Violence Against Women (OVW), and the Office of Community-Oriented Policing Services (COPS)); coordinate with the Department of the Interior's Office of Justice Services (BIA-OJS) to identify and arrange training and technical assistance specific to the tribe's needs; and work with the ITWG to identify other tribal or intertribal resources that may assist the tribe. After receiving training or technical assistance, a tribe may elect to prepare and submit a revised request.

Sixth, Justice Department personnel will recommend to the Associate Attorney General whether the requesting tribe should be designated as a participating tribe under 25 U.S.C. 1304 on an accelerated basis. This recommendation will turn on whether the requesting tribe's criminal justice system has adequate safeguards in place to protect defendants' rights, consistent with all subsections of 25 U.S.C. 1304. The Department's Office of Tribal Justice (OTJ) will inform the tribe's POC of the recommendation.

Seventh, if the recommendation is positive, the Department of Justice will consult with the requesting tribe to establish a date on which the tribe may commence exercising SDVCJ. The commencement date may be conditioned on the tribe receiving certain additional training or technical assistance or taking certain steps, such as notifying the public when the tribe will start exercising SDVCJ.

Eighth, if the Department of Justice and the tribe can reach agreement on a starting date and conditions (if any), the Associate Attorney General, exercising discretion delegated by the Attorney General, may designate the tribe as a participating tribe under 25 U.S.C. 1304 on an accelerated basis. The Department will publish notice of the designation on the Department's Tribal Justice and Safety website (<http://www.justice.gov/tribal/>) and in the *Federal Register*. The Department also will publish on its website the tribe's final Application Questionnaire, including attached excerpts of or links to tribal laws, rules, and policies.

3. Discussion of Public Comments on the June 2013 Notice

In response to the notice published on June 14, 2013, *see* Pilot Project for Tribal Jurisdiction Over Crimes of Domestic Violence, 78 FR 35961 (June 14, 2013), with a comment period through September 12, 2013, the Department of Justice received eight sets of comments: six from tribal governments or officials and two from national intertribal organizations. All comments have been considered in preparing this final notice. Set forth below is a summary of the comments, organized by topic, and the Department's responses to them.

The Intertribal Technical-Assistance Working Group (ITWG)

Comments: Nearly all the commenters applauded the creation of the ITWG, the speed with which its work got underway, the dedication and seriousness of its tribal members, and the support that the Departments of Justice and the Interior have provided. Three commenters urged the Department of Justice to continue supporting the ITWG and its planning and information-sharing functions at least into Phase Two and perhaps beyond.

Response: At least until early 2015, the Departments of Justice and the Interior will continue to support the ITWG with training and technical assistance to the extent possible with

available resources and to participate in ITWG meetings as observers or subject-matter experts if the tribal representatives so request.

Key Features of the June 2013 Notice

Comments: Two commenters stated that the statutory background in the Department's June 2013 *Federal Register* notice helped illuminate underlying constitutional and legal issues, historical context, the importance of inherent tribal sovereign authority, tribal governments' concern for public safety, and Congress's intent in enacting VAWA 2013's tribal-jurisdiction provisions. Most commenters stated that the extensive preliminary list of questions appended to that notice has been a useful tool for tribes as they assess their readiness to implement SDVCJ and consider amending their codes. One commenter, however, expressed concern that the way some questions were framed presumed that tribes were inadequately protecting important rights and thus understated the readiness and sophistication of many tribal court systems.

Response: The statutory background section of this final notice largely mirrors its counterpart from the June 2013 notice. The Department believes that the lengthy set of questions appended to the June 2013 notice has generally proved to be helpful to the ITWG and its members and was predicated on the well-founded assumption, grounded in decades of experience by the Departments of Justice and the Interior, that many tribal justice systems are sophisticated, fair, and fully capable of safeguarding the rights of all criminal defendants, Indian and non-Indian alike.

Government-to-Government Consultation, Apart from the ITWG

Comments: Four commenters asked the Department to remain available for one-on-one consultation with any tribe that wishes to have the Department preliminarily review proposed revisions to the tribe's codes and procedures before the tribe undertakes the potentially time-

consuming process of tribal community engagement and tribal-council approval or submits an application in Phase Two.

Response: Upon request from a tribe, the Departments of Justice and the Interior will continue to engage in one-on-one, government-to-government consultation to address a tribe's questions and concerns and, to the extent possible with available resources, to provide the training and technical assistance that the tribe's officers, employees, or contractors need before the tribe commences exercising SDVCJ.

Funding for Tribal Criminal Justice Systems

Comments: One commenter asked the Departments of Justice and the Interior to make funds available for contracting with special prosecutors and defense attorneys, and also noted the need for federal funding to provide training, technical assistance, data collection, and evaluation of tribes' criminal justice systems. Another commenter emphasized that, while the lack of federal funding makes the provision of tribal-court services more difficult, it does not actually endanger justice.

Response: The Departments of Justice and the Interior have been, and will continue, providing training, technical assistance, and other support for tribal justice systems with available resources. Under VAWA 2013, Congress has authorized funds to provide grants to tribal governments for various purposes, including prosecution and indigent defense counsel, and also to provide training, technical assistance, data collection, and evaluation of tribes' criminal justice systems. The Department of Justice will continue to evaluate what resources can be made available for these purposes.

Speed and the Need to Review Tribes' Criminal Justice Systems

Comments: Five commenters acknowledged that the Department must thoroughly evaluate each tribe's application, as Congress has given the Department the responsibility to determine whether the requesting tribe's criminal justice system has adequate safeguards in place to protect defendants' rights. But these and other commenters also urged the Department to continue on an expedited path and avoid getting bogged down in a lengthy or cumbersome process. As one commenter put it, tribal governments need to have their applications granted, so that they can "proceed with the important work of protecting their Native sisters, mothers, and daughters." Another commenter noted that some tribes would not be ready to submit an Application Questionnaire immediately upon publication of this final notice and specifically called for a one-month limit, from the date an application is received to the date it is granted or denied, to ensure that the Pilot Project would not expire before those tribes have had an opportunity to prosecute SDVCJ cases.

Response: Given the short time that Congress allotted, the Pilot Project's effectiveness depends in part on a speedy federal process for reviewing tribal applications. However, the Department takes very seriously its statutory responsibilities (1) to ensure that each tribe that exercises SDVCJ on an accelerated basis under the Pilot Project has adequate safeguards in place to protect defendants' rights, consistent with 25 U.S.C. 1304, and (2) to consult with affected tribes, and therefore believes that some applications will necessarily take longer than a month to properly review.

The Nature of the Federal Process for Reviewing Tribal Applications

Comments: Most commenters encouraged a flexible, collaborative process for Pilot Project approval, guided by respect for the government-to-government relationship between two

sovereigns and deference to tribal self-governance and self-determination, rather than a process that would be paternalistic, bureaucratic, burdensome, or resource-sapping.

Response: The Department accepts these comments and has incorporated—and will continue to incorporate—these concepts in the approval process.

Comments: One commenter requested clear and specific standards that the Department will use when reviewing a tribe’s Application Questionnaire and determining whether the tribe may commence exercising SDVCJ under the Pilot Project, so that tribes will know precisely what information would constitute an adequate response to each question in the Application Questionnaire. The commenter expressed concern that tribes not be “arbitrarily” prevented from exercising SDVCJ at the earliest possible date.

Response: The Department believes that this final notice sets forth clear standards grounded in the plain text of the new statute. Any effort to provide more detailed, precise, proscriptive guidance would, in the Department’s view, disrespect tribal discretion and undercut the flexibility to which each tribe, as a sovereign exercising its inherent authority, is entitled.

Comment: One commenter stated that no tribe should have to go through multiple rounds of corrections and therefore, if an application is rejected, the Department should at the time of rejection clearly and completely explain the application’s deficiencies that will need to be addressed in order to approve a revised application.

Response: The Department will strive to inform the tribe clearly, completely, and reasonably promptly of any deficiencies in its initial application.

Comments: One commenter suggested that the Department provide technical assistance to any tribe whose Application Questionnaire shows that the tribe’s criminal justice system does not meet VAWA 2013’s requirements, just as it would to a tribe that requests technical

assistance prior to submitting an Application Questionnaire. Another commenter stated that, if the Department finds that a tribe does not meet at least one of VAWA 2013's requirements, the tribe should be allowed to rectify the situation instead of the Department's denying the application.

Response: The Office of Tribal Justice (OTJ) will inform the tribe's POC of the initial recommendation from Justice Department personnel. Receiving an initially negative response will not bar a tribe from submitting a revised request at any time during Phase Two of the Pilot Project. Moreover, if funding is available, the Department may provide appropriate training or technical assistance to the tribe, which may enable the tribe to prepare and submit a revised request. The Department may also offer specific training and technical assistance to address particular needs through the National Indian Country Training Initiative or the Department's grant-making components (OJP, OVW, and COPS); coordinate with the Department of the Interior's Office of Justice Services (BIA-OJS) to identify and arrange training and technical assistance specific to the tribe's needs; and work with the ITWG to identify other tribal or intertribal resources that may assist the tribe. After receiving training or technical assistance, a tribe may elect to prepare and submit a revised request.

Comment: One commenter asked the Department to approve a tribe's application if its only deficiency is that the Secretary of the Interior has not yet approved changes that the tribe has made to its ordinances or codes in order to comply with VAWA 2013's requirements. The commenter also asked the Justice Department to encourage the Department of the Interior to expedite the approval process for amendments to a tribe's ordinances and codes.

Response: If the sole deficiency in a tribe's application is that some of the safeguards that it has put in place to protect defendants' rights, consistent with 25 U.S.C. 1304, depend on

tribal code amendments that are not yet effective because they have not yet been approved by the Secretary of the Interior, the Department of Justice would likely so inform the tribe, condition the tribe's commencement date for exercising SDVCJ on Secretarial approval of the tribal code amendments, and encourage the Department of the Interior to expedite the approval process.

Types of Questions on the Application Questionnaire

Comments: Six commenters suggested that the Application Questionnaire focus on the required elements under VAWA 2013. Most of them noted that the preliminary list of discussion questions appended to the Department's June 2013 notice, while helpful to the tribes in reviewing and internally assessing their own domestic violence efforts, focused on promoting tribal best practices rather than on revising tribal codes and procedures to satisfy VAWA 2013, and thus was too long and cumbersome to serve as a model for the Application Questionnaire. Three commenters encouraged the inclusion, after the mandatory questions, of some optional questions regarding best practices (e.g., whether the tribe has a victims' rights code) and noted that the answers to these optional questions could benefit other tribes. One commenter suggested that questions be designed to trigger very short answers, and three commenters suggested that short answers could be supplemented by attaching provisions from tribal codes and procedures.

Response: The Department accepts these comments.

Comment: One commenter suggested creating two options for federal approval of a tribe's request: one option would allow a more streamlined approach for tribes that are "ready now" to commence exercising SDVCJ; the second option could apply to those tribes that may require additional technical assistance.

Response: The Department rejects this comment and believes that, although each tribe's criminal justice system is different and has unique strengths and weaknesses, all tribes seeking to commence exercising SDVCJ on an accelerated basis under the VAWA Pilot Project should start

on an equal footing and be subject to consistent procedures and standards. Indeed, the central purpose of the Application Questionnaire is to determine which tribes are currently “ready” to exercise SDVCJ. Prematurely designating some tribes as “ready” and then exempting them from the requirement to complete the Application Questionnaire would be fundamentally unfair.

Comment: One commenter requested that the Application Questionnaire avoid any question that inadvertently might compromise the attorney-client privilege between the tribal council and its attorneys by eliciting commentary supporting tribal code revisions made in response to VAWA 2013.

Response: Answering the Application Questionnaire will not require the tribe to compromise, jeopardize, or waive its attorney-client privilege.

Specific Topics Potentially Covered by the Application Questionnaire

Comments: Three commenters suggested that the Application Questionnaire include questions on tribal criminal offenses for domestic violence, dating violence, and violations of protection orders; non-Indian defendants’ ties to the tribe; indigent defense counsel; licensed defense attorneys; public availability of tribal laws, including codes, regulations, rules, and interpretive documents; records of criminal proceedings; notification of federal habeas rights; the fair cross section requirement for jury pools (including a copy or description of a jury selection plan); and legal training and licenses for judges presiding over criminal proceedings.

Response: The Department largely accepts these comments, as the Application Questionnaire touches on all these topics, consistent with the plain text of 25 U.S.C. 1304.

Comment: One commenter asked the Department to provide further guidance on how jury pools can reflect a “fair cross section of the community” in the context of “checker-boarded” Indian country, where a tribe’s trust lands and restricted allotments are scattered across

vast territory. This commenter also requested further guidance on how a tribe can enforce jury summonses on the non-Indian population in such circumstances.

Response: To the extent possible with available resources, the Departments of Justice and the Interior will continue providing training and technical assistance on these issues, both directly to individual tribes and through the ITWG.

Comment: One commenter stated that questions about venire statistics could require a tribe to review court files and summonses issued and responded to, and then enter that information into a database—a potentially expensive, burdensome process.

Response: Although a tribe may want to collect or evaluate such data once it commences exercising SDVCJ, it need not do so before completing the Application Questionnaire.

Comment: One commenter opposed Application Questionnaire questions about individual judges' and attorneys' qualifications, especially for larger tribes that use rotating appointed counsel from the bar membership for indigent defense. The commenter also noted that changes in personnel could render the answers inaccurate. The commenter recommended focusing instead on the tribe's process for hiring or appointing judges and attorneys.

Response: The Application Questionnaire directly asks the tribe how it will safeguard defendants' rights to licensed indigent defense counsel and law-trained, licensed judges. And the Application Questionnaire also asks, in the context of anticipated SDVCJ cases during the Pilot Project, for a list of all jurisdictions where each indigent defense attorney is licensed to practice law, a list of all jurisdictions where each judge presiding over an SDVCJ proceeding is licensed to practice law, and a brief description of each judge's legal training to preside over criminal proceedings. To the extent that changes in personnel render the answers incomplete or

inaccurate during the Pilot Project (i.e., prior to March 7, 2015), the tribe's authorized point of contact (POC) will have the responsibility to provide the Department with updated information.

Comment: One commenter expressed concern about the Departments of Justice and the Interior holding tribal judges to higher standards than state judges or holding tribal indigent defense counsel to higher standards than state indigent defense counsel. The same commenter stated that the level of practice within the tribal courts, as to both the judges and the attorneys, often exceeds that found in state courts.

Response: The Department believes that, in many tribal criminal justice systems, the judges' and defense attorneys' licenses, legal training, and experience will compare favorably to those of the state or local judges and defense attorneys who participate in similar criminal proceedings in cases arising in or near the tribe's Indian country. The tribal courts' application of the federal statutory rights described in 25 U.S.C. 1304(d) should be comparable to state courts' application of the corresponding federal constitutional rights in similar cases.

Comment: One commenter objected to the Application Questionnaire asking for an accounting of the tribe's compliance with ICRA, as that would call for a lengthy, burdensome dissertation on tribal governance and constitutional law. The commenter stated that most tribes have either two or three independent branches of government, each with its own responsibilities for protecting individuals' rights. Furthermore, the commenter suggested that ICRA violations by tribal police or tribal prosecutors that were subsequently corrected, perhaps by the tribal courts themselves, should not disqualify a tribe from participating in the Pilot Project.

Response: The Application Questionnaire does not call for a lengthy or burdensome dissertation on tribal governance and constitutional law. But it does require the tribe to certify

and demonstrate that the tribe's criminal justice system has adequate safeguards in place to protect all applicable rights of defendants under ICRA, as amended.

Comment: One commenter suggested that the Application Questionnaire ask whether the tribe's judiciary is independent, either statutorily or functionally.

Response: Although the Application Questionnaire does not include a question specifically focusing on the independence of the tribe's judiciary, several of its questions present an opportunity for the tribe to submit information and legal materials on the independence of the tribe's judiciary.

Comment: One commenter stated that the Application Questionnaire should not ask whether tribal law permits imprisonment for failure to pay a criminal fine because VAWA 2013 does not authorize such imprisonment of a non-Indian defendant.

Response: The Application Questionnaire does not include any question about imprisonment for failure to pay a criminal fine.

Comment: One commenter objected to the Application Questionnaire containing questions about the topics of "tribal protection of victims' rights"; "detention, corrections, probation, and parole"; "crime information databases"; and "commencing to exercise SDVCJ," akin to the preliminary questions found at 78 FR 35973-74, although the commenter stated that these questions were useful for discussing the protection of victims and various administrative considerations. Another commenter asked the Department to omit from the Application Questionnaire any question about the tribe's capacity to access certain national crime information databases.

Response: The Application Questionnaire does not require answers to questions on these topics, but does allow each tribe, at its discretion, to provide additional information or legal

materials relevant to these or other topics that may be helpful in addressing the tribe's readiness to commence exercising SDVCJ on an accelerated basis while protecting defendants' rights, consistent with 25 U.S.C. 1304.

Comment: One commenter asked the Department to provide further guidance on how non-Indians may be detained and which parties will be responsible for health care for incarcerated non-Indian offenders.

Response: To the extent possible with available resources, the Departments of Justice and the Interior will continue providing training and technical assistance on these issues, both directly to individual tribes and through the ITWG.

Comment: One commenter opposed requiring Pilot Project tribes to collect and analyze data on the tribe's SDVCJ cases, even if such statistics would be useful in reducing domestic violence or providing victim services.

Response: The Department will not require Pilot Project tribes to collect or analyze data on SDVCJ cases, but tribes are free to do so either on their own or in collaboration with other tribes through the ITWG.

Comment: One commenter asked the Department to include in the Application Questionnaire a question about whether, how, and by what amount VAWA 2013 implementation will cause increases in costs and budgets for tribal courts, prosecution, defense attorneys, and tribal police.

Response: The final question in the Application Questionnaire invites tribes, at their discretion, to address any pertinent topic that the tribe would like the Departments of Justice and the Interior to consider when reviewing the tribe's Application Questionnaire. So a tribe is free to submit information about costs and budgets, if it so chooses.

Tribal Self-Certification and the Application Questionnaire

Comments: Most commenters stated that the approval process should focus on “self-certification,” with a straightforward tribal government certification of well-known criminal-procedure standards. This approach was commended because there is limited time left within the two-year Pilot Project period, because the individuals working in or with the tribal justice system on a daily basis are best positioned to evaluate the adequacy of its safeguards to protect defendants’ rights, because those same individuals have a great incentive to avoid adverse findings in federal habeas proceedings, and also because self-certification promotes tribal self-determination and respects the tribes’ inherent authority to exercise this criminal jurisdiction.

Response: Tribal self-certification is a central feature of the procedures established by this final notice. The Application Questionnaire must be certified as complete and accurate by the tribe’s chief executive, judicial, and legal officers. Furthermore, each of these officers must certify that he or she has read the Indian Civil Rights Act, as amended by TLOA and VAWA 2013, and that the tribe’s criminal justice system has adequate safeguards in place to protect defendants’ rights, consistent with 25 U.S.C. 1304.

Comment: One commenter suggested that, to ensure accurate information and minimize potential delays, the Department should rely on the tribe’s designated point of contact, who could be a tribal leader, a tribal chief judge, a tribal attorney, or another tribal governmental official.

Response: The Application Questionnaire requires the tribe’s governing body to authorize one person to serve as the tribe’s point of contact (POC) with the Department of Justice for purposes of the VAWA Pilot Project. The POC, who can be the tribe’s chief executive, judicial, or legal officer, or some other person chosen by the tribe’s governing body, should make best efforts during the Pilot Project to promptly answer written or oral questions from the Departments of Justice and the Interior about the tribe’s criminal justice system; update any

answers to the Application Questionnaire if they become incomplete, inaccurate, or outdated; fix any omissions in the Application Questionnaire; and submit to the Department of Justice any additions, deletions, or corrections to the Application Questionnaire.

4. Statutory and Executive Order Reviews

General Disclaimers

This final notice is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party in any matter, civil or criminal, against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person, nor does this final notice place any limitations on otherwise lawful litigative prerogatives of the U.S. Department of Justice.

Furthermore, nothing in this final notice shall be construed to (1) encroach upon or diminish in any way the inherent sovereign authority of each tribe over its own government, legal system, law enforcement, and personnel matters; (2) imply that any tribal justice system is an instrumentality of the United States; or (3) alter the trust responsibility of the United States to Indian tribes.

Administrative Procedure Act

This final notice concerns interpretive rules, general statements of policy, or rules of agency organization, procedure, or practice for purposes of the Administrative Procedure Act, and therefore notice and comment are not required under 5 U.S.C. 553(b)(A). Nonetheless, the Department of Justice published the June 2013 notice in the *Federal Register* and on the Department's Tribal Justice and Safety website for public comment, as well as to solicit preliminary expressions of interest in the Pilot Project.

Executive Order 13175—Consultation and Coordination with Indian Tribal Governments

This final notice fully comports with Executive Order 13175 of November 6, 2000. Although it creates no new substantive rights and imposes no binding legal requirements, the final notice has tribal implications because it will have substantial direct effects on Indian tribes and their relationships with the Federal Government. The Department therefore has engaged in meaningful consultation and collaboration with elected and duly appointed tribal officials in developing this final notice.

More specifically, the Department of Justice organized and led two telephonic consultations with tribal leaders on how best to structure and implement the voluntary Pilot Project established under sections 904 and 908 of VAWA 2013. To facilitate the consultation and frame the discussion with tribal governments, in mid-April the Department circulated a six-page framing paper that presented background on the new law and raised a series of questions on specific issues relating to the Pilot Project.²⁷ The first consultation was held on May 14, 2013, and the second on May 17, 2013. The Department also consulted members and representatives of the Attorney General's Tribal Nations Leadership Council on April 30, 2013.

On April 12, 2013, the Department participated in a hearing of the Indian Law and Order Commission on implementation of VAWA 2013 and the Pilot Project, held in conjunction with the Federal Bar Association's 38th Annual Indian Law Conference in New Mexico. In addition, the Department held a series of informal consultations with tribal stakeholders, including calls with tribal judges and court personnel (on May 8, 2013); tribal prosecutors (May 13); tribal public defenders (May 2); federal public defenders (May 6); tribal in-house counsel (May 9); tribal victim advocates and victim service providers (May 1); and professors of Indian law (May 10). Finally, the Department received written comments from more than a dozen American

²⁷ U.S. Department of Justice, *Implementation of Sections 904 and 908 of the Violence Against Women Reauthorization Act of 2013* (Apr. 16, 2013).

Indian and Alaska Native tribes, members of the public, and intertribal organizations, including the National Congress of American Indians (NCAI), the National American Indian Court Judges Association (NAICJA), the National Association of Indian Legal Services (NAILS), and the Tribal Law and Policy Institute (TLPI).

During these consultations, some tribal officials expressed a desire to expedite the Pilot Project process, while other tribal officials asked the Department of Justice to engage in further tribal consultation before proceeding. Generally, there was a consensus that the main value of the Pilot Project would lie in (1) collaboration and information-sharing among the Pilot Project tribes; (2) flexible interaction between tribes and criminal justice experts at the Department of Justice and elsewhere; and (3) collecting the various tribal laws and procedures developed by the Pilot Project tribes that exercise SDVCJ on an accelerated basis and “sharing that information forward” with tribes that may implement VAWA 2013 and exercise SDVCJ after the Pilot Project is completed in March 2015.

There also was a strong consensus in favor of tribal “self-certification”—that is, a process in which the requesting tribe provides brief written answers to detailed questions about its criminal justice system; the tribe’s leader, attorney, and chief judge each certify the completeness and accuracy of the answers; and Justice Department personnel then rely principally on those answers and thus need to engage in only limited follow-up inquiries, rather than undertake extensive investigation and site visits. At the same time, tribal officials recognized that the Department of Justice has a responsibility to exercise due diligence in assessing tribes’ capacities and therefore must at times review extrinsic evidence of tribes’ compliance with the new federal law’s requirements, including tribal constitutional provisions, tribal code provisions, tribal court

rules, tribal administrative orders, tribal written policies, and tribal written procedures, as well as summaries of the qualifications of certain tribal staff.

During the five months following the Department's publication of the June 2013 notice in the *Federal Register*, informal tribal consultation has continued. First, the Departments of Justice and the Interior have received extensive advice and guidance from tribal officers, employees, experts, and consultants as part of the ITWG's collective deliberations. Second, on multiple occasions in the last five months, each Department has taken the opportunity to engage in one-on-one, government-to-government consultation on issues of unique concern to a particular tribal member of the ITWG.

The Department of Justice believes that this final notice addresses the key concerns that tribal officials highlighted at the tribal consultations in April and May 2013, at ITWG meetings during Phase One, in one-on-one, government-to-government consultations during Phase One, and in public comments received in September 2013. The two-phased structure is designed to move forward quickly with implementation, yet allow adequate time for deliberation and consultation. Phase One of the Pilot Project addressed the consensus about intertribal collaboration and information-sharing. Phase Two will allow that collaboration and information-sharing to continue and will put into effect the consensus about tribal self-certification, while also providing for necessary, targeted follow-up inquiries by the Department of Justice.

Executive Orders 12866 and 13563—Regulatory Planning and Review

Because this final notice is not a "significant regulatory action" under Executive Order 12866 of September 30, 1993 ("Regulatory Planning and Review"), as amended, it is not subject to review under Executive Order 12866 or 13563.

Executive Order 13132—Federalism

This final notice will not have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government. Under 25 U.S.C. 1304(b)(2)-(3), a participating tribe may exercise SDVCJ only concurrently with the jurisdiction of the United States, of a state, or of both. The new law does not alter federal or state criminal jurisdiction. Therefore, in accordance with Executive Order 13132 of August 4, 1999, this final notice does not have sufficient federalism implications to warrant the preparation of a federalism assessment.

Executive Order 12988—Civil Justice Reform

This final notice meets the applicable standards set forth in section 3(a) and (b)(2) of Executive Order 12988 of February 5, 1996.

Regulatory Flexibility Act

Because this final notice is not promulgated as a final rule under 5 U.S.C. 553 and was not required under that section to be published as a proposed rule, the requirements for the preparation of a regulatory flexibility analysis under 5 U.S.C. 604(a) do not apply. In any event, this final notice will not have a significant economic impact on a substantial number of small entities; thus, no regulatory flexibility analysis is required for that reason as well. *Id.* 605(b).

Unfunded Mandates Reform Act of 1995

This final notice will not result in the expenditure by state, local, and tribal governments, in the aggregate, or by the private sector, of \$100 million or more in any one year, and it will not significantly or uniquely affect small governments. Moreover, becoming a participating tribe and exercising SDVCJ—whether as part of the Pilot Project between now and March 2015, or at any time after March 2015—are entirely voluntary. Therefore, no actions were deemed

necessary under the provisions of the Unfunded Mandates Reform Act of 1995, Public Law 104–4.

Small Business Regulatory Enforcement Fairness Act of 1996

Because this final notice is not a rule, it need not be reviewed under section 251 of the Small Business Regulatory Enforcement Fairness Act of 1996, 5 U.S.C. 804. In any event, this final notice will not result in an annual effect on the economy of \$100 million or more; a major increase in costs or prices; or significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of United States-based enterprises to compete with foreign-based enterprises in domestic and export markets. *See id.*

Paperwork Reduction Act

This final notice establishes a new “collection of information” covered by the Paperwork Reduction Act of 1995 (PRA), as amended, 44 U.S.C. 3501–3521. Under the PRA, a covered agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid control number assigned by the Office of Management and Budget (OMB). *Id.* 3507(a)(3), 3512. The information collection in this final notice requires an Indian tribe seeking to exercise SDVCJ on an accelerated basis during the Pilot Project established under VAWA 2013 to provide to the Department certain information about the tribe’s criminal justice system and its safeguards for defendants’ federal rights. The Department submitted an information-collection request to OMB for review and approval in accordance with the review procedures of the PRA. OMB approved the collection on November 20, 2013, and assigned OMB control number 1105-0101.

The Department of Justice did not receive any comments specifically about the proposed collection.

Dated: November 25, 2013.

Eric H. Holder, Jr.,
Attorney General.

APPENDIX

APPLICATION QUESTIONNAIRE FOR THE VAWA PILOT PROJECT ON TRIBAL CRIMINAL JURISDICTION

Instructions

Completing this Application Questionnaire is a necessary step for any Indian tribe that wishes to commence exercising special domestic violence criminal jurisdiction (SDVCJ) on an accelerated basis (i.e., prior to March 7, 2015) under the voluntary Pilot Project described in section 908(b)(2) of the Violence Against Women Reauthorization Act of 2013 (VAWA 2013). Please review this Application Questionnaire in its entirety before beginning to fill it out.

It is the Tribe's responsibility to ensure that the application is complete and accurate. To the extent that future changes in the Tribe's laws, rules, policies, or personnel render the answers incomplete or inaccurate during the Pilot Project (i.e., prior to March 7, 2015), the Tribe's authorized point of contact (POC) will have the responsibility of providing the Department of Justice with updated information.

Most questions can be answered with a "Yes" or a "No." If the Tribe wishes to provide a longer answer to a particular question, the Tribe should please feel free to attach additional pages, but on each additional page please identify by number the question(s) being answered.

Most questions expressly call for "relevant legal materials." When answering these questions, any of the following types of legal materials might be relevant:

- Tribal constitutional provisions
- Tribal code or statutory provisions
- Tribal court rules, such as tribal rules of criminal procedure, tribal rules of evidence, or tribal rules of appellate procedure
- Tribal judicial opinions
- Tribal court administrator's or clerk's manuals
- Tribal regulations
- Tribal administrative orders
- Tribal written policies

- Tribal written procedures
- A concise written description of an otherwise unwritten tribal practice (whether or not the practice is based in the Tribe's customs or traditions)

These “relevant legal materials” will form the core of the Tribe’s application, so please be sure (1) to include all legal materials that are actually relevant to the question whether the Tribe’s criminal justice system has adequate safeguards in place to protect defendants’ rights, consistent with 25 U.S.C. 1304, and (2) not to include irrelevant materials, as doing so may slow down the review process that the Departments of Justice and the Interior are statutorily required to undertake. In determining which legal materials are relevant, the Department recommends that the Tribe review the materials created or gathered by the Intertribal Technical-Assistance Working Group on Special Domestic Violence Criminal Jurisdiction (ITWG) and the list of substantive questions appended to the Department’s June 2013 *Federal Register* notice, *see* 78 FR 35961, 35969-74 (June 14, 2013).

These “relevant legal materials” collected from the tribes that successfully apply to participate in Phase Two of the Pilot Project eventually will be made publicly available on the Department of Justice’s website. The posted materials will serve as a resource for other tribes, including those that may elect to commence exercising SDVCJ after the Pilot Project has concluded.

The Tribe may submit “relevant legal materials” in either of two ways. First, if the particular document (e.g., a tribal code provision or court rule) is freely and publicly available on the Internet, the Tribe may provide a full legal citation to the precise material that the Tribe deems relevant to answering the question, such as a specific subsection of a tribal code provision, along with the exact URL (i.e., Web address) where the material can be found on the Internet. Second, the precise material that the Tribe deems relevant to answering the question

may be attached to the Tribe's completed Application Questionnaire as an electronic copy (if the Tribe is submitting the application by e-mail) or as a paper copy (if the Tribe is submitting the application by mail).

Please send the completed Application Questionnaire, along with all attachments, by e-mail (or, if necessary, by mail) to:

Office of Tribal Justice
Department of Justice
950 Pennsylvania Avenue, NW, Room 2310
Washington, DC 20530
E-Mail: OTJ@usdoj.gov

If you have questions or need assistance, please contact Mr. Tracy Toulou, Director, Office of Tribal Justice, Department of Justice, at (202) 514-8812 (not a toll-free number).

A tribe may apply at any time before March 7, 2015. All applications received at any time within 30 days after the publication of the Department of Justice's final notice in the *Federal Register* (i.e., the final notice to which this Application Questionnaire is appended) will be given the same priority consideration. There is no advantage to be gained by submitting an Application Questionnaire immediately after publication of the final notice. The Tribe should ensure that it completely and accurately answers all questions and attaches all relevant legal materials.

The Department of Justice will not consider an application that is incomplete, but will attempt to notify the Tribe's POC regarding any deficiencies. The Tribe may submit a revised application at any time prior to March 7, 2015. Final decisions regarding whether or when a tribe may commence exercising SDVCJ on an accelerated basis are not appealable.

Questions

The Right to Trial by an Impartial Jury

1. In a criminal proceeding in which the Tribe will exercise SDVCJ, will the Tribe provide to the defendant the right to a trial by an impartial jury that is drawn from sources that reflect a fair cross section of the community and do not systematically exclude any distinctive group in the community, including non-Indians? Please answer “Yes” or “No.” Please provide relevant legal materials detailing the safeguards that the Tribe’s criminal justice system has in place to protect this right.

The Right to Effective Assistance of Counsel

2. In a criminal proceeding in which the Tribe will exercise SDVCJ and in which a term of imprisonment of any length may be imposed, will the Tribe provide to the defendant the right to effective assistance of counsel at least equal to that guaranteed by the United States Constitution? Please answer “Yes” or “No.” Please provide relevant legal materials detailing the safeguards that the Tribe’s criminal justice system has in place to protect this right.

The Right to Indigent Defense Counsel

3. In a criminal proceeding in which the Tribe will exercise SDVCJ and in which a term of imprisonment of any length may be imposed, will the Tribe provide to each indigent defendant, at no cost to the defendant, the right to the assistance of a defense attorney licensed to practice law by any jurisdiction in the United States that applies appropriate professional licensing standards and effectively ensures the competence and professional responsibility of its licensed attorneys? Please answer “Yes” or “No.” Please provide relevant legal materials detailing the safeguards that the Tribe’s criminal justice system has in place to protect this right.

4. For each licensed defense attorney that the Tribe anticipates will be appointed to represent an indigent defendant in a criminal proceeding in which the Tribe will exercise SDVCJ during the Pilot Project (i.e., prior to March 7, 2015) and in which a term of imprisonment of any length may be imposed, please provide a list of all jurisdictions in which the defense attorney is licensed to practice law. Please provide a separate list of jurisdictions for each attorney (who can be identified either by name or anonymously as “Attorney 1,” “Attorney 2,” etc.).

The Right to a Law-Trained, Licensed Judge

5. In a criminal proceeding in which the Tribe will exercise SDVCJ and in which a term of imprisonment of any length may be imposed, will the Tribe provide to the defendant the right to a criminal proceeding presided over by a judge who has sufficient legal training to preside over criminal proceedings and is licensed to practice law by any jurisdiction in the United States? Please answer “Yes” or “No.” Please provide relevant legal materials detailing the safeguards that the Tribe’s criminal justice system has in place to protect this right.
6. For each judge that the Tribe anticipates will preside over a criminal proceeding in which the Tribe will exercise SDVCJ during the Pilot Project (i.e., prior to March 7, 2015) and in which a term of imprisonment of any length may be imposed, please provide (a) a brief description of the judge’s legal training to preside over criminal proceedings, and (b) a list of all jurisdictions in which that judge is licensed to practice law. Please provide a separate answer for each judge (who can be identified either by name or anonymously as “Judge 1,” “Judge 2,” etc.).

The Right to Publicly Available Laws and Rules

7. In a criminal proceeding in which the Tribe will exercise SDVCJ and in which a term of imprisonment of any length may be imposed, will the Tribe, prior to charging the defendant, make publicly available the criminal laws (including regulations and interpretative documents), rules of evidence, and rules of criminal procedure (including rules governing the recusal of judges in appropriate circumstances) of the tribal government? Please answer “Yes” or “No.” Please provide relevant legal materials detailing the safeguards that the Tribe’s criminal justice system has in place to protect this right.

The Right to Records of the Criminal Proceeding

8. In a criminal proceeding in which the Tribe will exercise SDVCJ and in which a term of imprisonment of any length may be imposed, will the Tribe maintain a record of the criminal proceeding, including an audio or other recording of the trial proceeding? Please answer “Yes” or “No.” Please provide relevant legal materials detailing the safeguards that the Tribe’s criminal justice system has in place to protect this right.

The Right to Timely Notice of Federal Habeas Corpus Rights and Privileges

9. Will the Tribe provide to each person detained by order of the Tribe timely notice of the person’s rights and privileges to file in a court of the United States a petition for a writ of habeas corpus under 25 U.S.C. 1303 and a petition to stay further detention under 25 U.S.C. 1304(e)? Please answer “Yes” or “No.” Please provide relevant legal materials detailing the safeguards that the Tribe’s criminal justice system has in place to protect this right to timely notice.

Other Rights Protected by the Indian Civil Rights Act of 1968

10. In a criminal proceeding in which the Tribe will exercise SDVCJ, will the Tribe provide to the defendant all applicable rights under the Indian Civil Rights Act of 1968, as amended, including but not limited to (a) the right of the people to be secure in their persons, houses, papers, and effects against unreasonable search and seizures, and not to be subjected to a warrant unless it was issued upon probable cause, was supported by oath or affirmation, and particularly described the place to be searched and the person or thing to be seized; (b) the right not to be twice put in jeopardy for the same offense; (c) the right not to be compelled to be a witness against himself; (d) the right to a speedy and public trial; (e) the right to be informed of the nature and cause of the accusation; (f) the right to be confronted with the witnesses against him; (g) the right to have compulsory process for obtaining witnesses in his favor; (h) the right to be free from excessive bail; (i) the right to be free from excessive fines; (j) the right against cruel and unusual punishments; (k) the right to the equal protection of the Tribe's laws; (l) the right not to be deprived of liberty or property without due process of law; (m) the right not to be subjected to an ex post facto law; and (n) the right to a trial by jury of not less than six persons? Please answer "Yes" or "No." Please provide relevant legal materials detailing the safeguards that the Tribe's criminal justice system has in place to protect these rights.

Tribal Criminal Jurisdiction

11. Will the Tribe exercise SDVCJ over a defendant only for criminal conduct constituting, within the meaning of 25 U.S.C. 1304, either (a) an act of domestic violence or dating violence that occurs in the Indian country of the Tribe, or (b) an act that occurs in the Indian country of the Tribe and violates the portion of a protection order that (1) prohibits or provides protection against violent or threatening acts or harassment against, sexual

violence against, contact or communication with, or physical proximity to, another person; (2) was issued against the defendant; (3) is enforceable by the Tribe; and (4) is consistent with 18 U.S.C. 2265(b)?* Please answer “Yes” or “No.” Please provide relevant legal materials detailing the safeguards that the Tribe’s criminal justice system has in place to protect this right.

12. In a criminal proceeding in which the Tribe will exercise SDVCJ, will the Tribe convict a non-Indian defendant at trial only if the Tribe proves that the alleged victim is an Indian? Please answer “Yes” or “No.” Please provide relevant legal materials detailing the safeguards that the Tribe’s criminal justice system has in place to protect this right.

13. In a criminal proceeding in which the Tribe will exercise SDVCJ, will the Tribe convict a defendant at trial only if the Tribe proves that the defendant resides in the Indian country of the Tribe; is employed in the Indian country of the Tribe; or is a spouse, intimate partner, or dating partner either of a member of the Tribe or of an Indian who resides in the Indian country of the Tribe? Please answer “Yes” or “No.” Please provide relevant legal materials detailing the safeguards that the Tribe’s criminal justice system has in place to protect this right.

Other Considerations

14. This final question is optional. If the Tribe believes it would be helpful to the Departments of Justice and the Interior in fulfilling their statutory duties related to the Pilot Project, the Tribe may provide any additional information or relevant legal materials

* A protection order issued by a state, tribal, or territorial court is consistent with 18 U.S.C. 2265(b) if “such court has jurisdiction over the parties and matter under the law of such State, Indian tribe, or territory; and . . . reasonable notice and opportunity to be heard is given to the person against whom the order is sought sufficient to protect that person’s right to due process. In the case of ex parte orders, notice and opportunity to be heard must be provided within the time required by State, tribal, or territorial law, and in any event within a reasonable time after the order is issued, sufficient to protect the respondent’s due process rights.” 18 U.S.C. 2265(b).

addressing the Tribe's readiness to commence exercising SDVCJ on an accelerated basis while protecting defendants' rights, consistent with 25 U.S.C. 1304. Additional information or relevant legal materials may focus on any of the following topics: (a) the Tribe's history of compliance with the Indian Civil Rights Act of 1968, as amended; (b) the Tribe's recent history, following the 2010 enactment of 25 U.S.C. 1302(b)-(c), of imposing total terms of imprisonment of more than one year; (c) the Tribe's formal or informal policies for coordinating with federal or state criminal investigators and prosecutors in cases where the Tribe may have concurrent criminal jurisdiction; (d) the Tribe's efforts to combat domestic violence and dating violence, including issuing and enforcing protection orders; (e) the Tribe's efforts to protect the rights and safety of victims of domestic violence and dating violence; (f) the Tribe's methods for summoning, selecting, and instructing jurors; (g) the Tribe's efforts to strengthen law enforcement, prosecution, trial and appellate courts, probation systems, detention and correctional facilities, alternative rehabilitation centers, culturally appropriate services and assistance for victims and their families, criminal codes, rules of criminal procedure, rules of appellate procedure, rules of evidence, and the capacity of law enforcement or court personnel to enter information into and obtain information from national crime information databases; (h) the Tribe's needs for training, technical assistance, data collection, and evaluation of the Tribe's criminal justice system; (i) the date on which the Tribe would like to commence exercising SDVCJ under the Pilot Project; (j) the Tribe's plans to notify the public before commencing to exercise SDVCJ; and (k) any other pertinent topic that the Tribe would like the Departments of Justice and the Interior to consider when reviewing the Tribe's Application Questionnaire.

Certifications

The completeness and accuracy of this Application Questionnaire must be certified by (1) the chief executive officer of the Tribe (e.g., the tribal chairperson, president, governor, principal chief, or other equivalent official); (2) the chief judicial officer of the Tribe (e.g., the tribal chief justice, chief judge, or other equivalent official); (3) the chief legal officer of the Tribe (e.g., the tribal attorney general, attorney, general counsel, or other equivalent official); and (4) the person authorized by the Tribe's governing body to be the Tribe's point of contact (POC) for the Department of Justice in this application process. The POC may be either one of the three officers listed above or a fourth individual selected by the Tribe's governing body. Each of these individuals must sign and certify the Application Questionnaire below.

Certification of the Tribe's Chief Executive Officer

1. I am the chief executive officer of _____ [enter the name of the requesting tribe] ("the Tribe").
2. I certify that I have read the Indian Civil Rights Act, as amended, 25 U.S.C. 1301-1304, including the amendments made by VAWA 2013.
3. I certify that, to the best of my knowledge, information, and belief, formed after an inquiry that is reasonable under the circumstances, the answers to this Application Questionnaire are complete and accurate.
4. I certify that, to the best of my knowledge, information, and belief, formed after an inquiry that is reasonable under the circumstances, the criminal justice system of the Tribe has adequate safeguards in place to protect defendants' rights, consistent with 25 U.S.C. 1304.

Signature:

Date:

Name:

Title or Position:

Address:
City/State/Zip:
Phone:
FAX:
E-mail:

Certification of the Tribe's Chief Judicial Officer

1. I am the chief judicial officer of _____ [enter the name of the requesting tribe] ("the Tribe").
2. I certify that I have read the Indian Civil Rights Act, as amended, 25 U.S.C. 1301-1304, including the amendments made by VAWA 2013.
3. I certify that I have read the final notice on the "Pilot Project for Tribal Jurisdiction over Crimes of Domestic Violence" published by the Department of Justice in the *Federal Register* on [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER].
4. I certify that, to the best of my knowledge, information, and belief, formed after an inquiry that is reasonable under the circumstances, the answers to this Application Questionnaire are complete and accurate.
5. I certify that, to the best of my knowledge, information, and belief, formed after an inquiry that is reasonable under the circumstances, the criminal justice system of the Tribe has adequate safeguards in place to protect defendants' rights, consistent with 25 U.S.C. 1304.

Signature:
Date:
Name:
Title or Position:
Address:
City/State/Zip:
Phone:
FAX:
E-mail:

Certification of the Tribe's Chief Legal Officer

1. I am the chief legal officer of _____ [enter the name of the requesting tribe] (“the Tribe”).
2. I certify that I have read the Indian Civil Rights Act, as amended, 25 U.S.C. 1301-1304, including the amendments made by VAWA 2013.
3. I certify that I have read the final notice on the “Pilot Project for Tribal Jurisdiction over Crimes of Domestic Violence” published by the Department of Justice in the *Federal Register* on [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER].
4. I certify that, to the best of my knowledge, information, and belief, formed after an inquiry that is reasonable under the circumstances, the answers to this Application Questionnaire are complete and accurate.
5. I certify that, to the best of my knowledge, information, and belief, formed after an inquiry that is reasonable under the circumstances, the criminal justice system of the Tribe has adequate safeguards in place to protect defendants’ rights, consistent with 25 U.S.C. 1304.

Signature:

Date:

Name:

Title or Position:

Address:

City/State/Zip:

Phone:

FAX:

E-mail:

Certification of the Tribe’s Point of Contact

1. I have been authorized by the governing body of _____ [enter the name of the requesting tribe] (“the Tribe”) to serve as the Tribe’s point of contact (POC) with the Department of Justice for purposes of the VAWA Pilot Project.

2. I certify that I have read the Indian Civil Rights Act, as amended, 25 U.S.C. 1301-1304, including the amendments made by VAWA 2013.
3. I certify that I have read the final notice on the “Pilot Project for Tribal Jurisdiction over Crimes of Domestic Violence” published by the Department of Justice in the *Federal Register* on [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER].
4. I certify that, to the best of my knowledge, information, and belief, formed after an inquiry that is reasonable under the circumstances, the answers to this Application Questionnaire are complete and accurate.
5. I certify that, to assist the Department of Justice in fulfilling its statutory duty to determine whether the criminal justice system of the Tribe has adequate safeguards in place to protect defendants’ rights, consistent with 25 U.S.C. 1304, I will make best efforts, for the remainder of the Pilot Project’s duration (i.e., prior to March 7, 2015), to promptly answer written or oral questions from the Departments of Justice and the Interior about the Tribe’s criminal justice system; to promptly update any answers to this Application Questionnaire if they become incomplete, inaccurate, or outdated; to promptly fix any omissions in the Application Questionnaire; and to promptly submit to the Department of Justice any additions, deletions, or corrections to the Application Questionnaire.

Signature:

Date:

Name:

Title or Position:

Address:

City/State/Zip:

Phone:

FAX:

E-mail:

